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Case No. 88-445

SUPREME COURT OF THE UNITED STATES

OCTOBER, 1988, TERM

PAUL and ANNA BROAD,

Petitioners,

-against-

WILLIAM F. CONWAY, ROBERT H. ISEMAN, and DeGRAFF, FOY, CONWAY, HOLT-HARRIS & MEALEY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT; ORDER UPHOLDING ORDER FOR SUMMARY JUDGMENT FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

In the summer of 1982, the plaintiffs engaged the law firm of DeGraff, Foy, Conway, Holt-Harris & Mealey (hereinafter referred to as "the DeGraff firm") to bring a libel action against General Electric Broadcasting, Inc., and its reporter, Judy Sanders (hereinafter referred to collectively as "Channel 6"). The gravamen of the plaintiffs' action against Channel 6 was the implication, in a news broadcast, that the plaintiffs' behavior towards Mrs. Broad's daughter, Elena, may have contributed to what was then believed to be Elena's death by suicide.

On September 16, 1985, the case was called for trial in the United States District Court for the Northern District of New York. After jury selection, but before the beginning of testimony, the plaintiffs settled their case against

Channel 6. That settlement resulted in a publicly broadcast apology by the television station and the payment to the plaintiffs of the sum of $25,000.

Plaintiffs now claim that they were coerced into settling by the DeGraff firm. Contrary to their claim of coercion, however, the plaintiffs clearly and unequivocally affirmed their acceptance of the terms of the settlement in open court, and in response to direct questioning from the trial judge. The transcript records the following preliminary proceedings after the trial judge directed the parties into the courtroom for the commencement of the trial:

"THE COURT: Ready to proceed?

"MR. ISEMAN: Ready for the Plaintiff, your Honor.

"MR. SABO: Ready for the Defendant, your Honor.

"THE COURT: All right. That's the choice of everybody?

"MR. SABO: Well, can I have just 30 seconds, your Honor?

"THE COURT: All right.

"MR. SABO: I think we've got it, Judge.

"THE COURT: Let's put it on the record then. Somebody's going to have to start.

"MR. ISEMAN: I am not at all clear on what the terms of this are, your Honor. I think we're ready to proceed at this point.

"THE COURT: You have a proposed disposition of this matter; is that correct?

"MR. SABO: I do, your Honor."

The details of the settlement, and particularly the details of the statement to be broadcast by Channel 6, were then directly negotiated and discussed, on the

record, by the plaintiffs with counsel for Channel 6 and the trial judge. In fact, the court instructed the plaintiffs to listen carefully to the proposal and told them that he wanted to make sure that their decision was a voluntary one.

"THE COURT: All right. Mr. and Mrs. Broad, will you listen to the proposition that Mr. Sabo, on behalf of the Defendants, is making which I wish you to listen to attentively, and after it is on the record, I'm going to ask you if you agree to it' and I'm going to ask you if this is your own voluntary desire to dispose of this matter in this manner. Do you understand that?

"MR. BROAD: Yes, your Honor.

"THE COURT: And I want to be sure that you have no coercion, no external influence and this is your free and voluntary desire. Do you understand that?

"MR. BROAD: Yes, your Honor."

At the conclusion of the discussion the court again inquired of the plaintiffs as to whether they wished to voluntarily settle the case on the terms set forth in the record, and the plaintiffs responded in the affirmative.

"THE COURT: Is that satisfactory, Mr. Broad?

"MR. BROAD: Yes, sir.

"THE COURT: Mrs. Broad?

"MRS. BROAD: Yes.

"THE COURT: And no coercion or influence has been exerted upon you by anyone to enable you to arrive at this disposition; is that correct?

"MR. BROAD: Correct, your Honor.

"THE COURT: Mrs. Broad?

"MRS. BROAD: Yes."

(Respondents' Appendix 1-14).

On the evening of September 17, 1985, Channel 6 broadcast the agreed-upon

statement, in which it conceded the factual allegations made about the plaintiffs were untrue.

On October 8, 1985, about three weeks after the settlement was agreed to in open court by the plaintiffs, they signed and returned to the DeGraff firm a general release, and thereafter received the sum of $18,491.95 as their net recovery from the litigation.

THE DECISION OF THE DISTRICT COURT

The District Court found two separate, distinct and independently dispositive reasons why the plaintiffs' complaint must be dismissed. (The decision of the District Court appears as Item 7 in the Petitioner's Appendix.) First, applying the common law of the State of New York, the court ruled that the plaintiffs were estopped from denying their clear and unequivocal affirmance of the settlement. Had the plaintiffs responded differently to the court's questioning, the settlement would not have been accepted, the DeGraff firm would have withdrawn and the instant litigation would have been avoided.

Second, the plaintiffs failed to show their ability to proceed differently in the absence of the settlement. The

courts below correctly found that this is a requirement of the common law of New York governing actions for legal malpractice. Specifically, the District Court, affirmed by the Court of Appeals, found no proximate connection between the settlement (even assuming, ad arguendo, that it was not voluntary) and any damage to the plaintiffs. The court identified three reasons for this conclusion:

(a) the underlying malpractice claim would have been dismissed under controlling case law in the State of New York (Gaeta v. New York News, 62 NY2d 340 [1984]).

(b) the plaintiffs did not show that they suffered any legally cognizable and compensable damage as a result of the settlement and as required under New York law; and

(c) The plaintiffs did not show that the result of the claim against Channel 6 would have been more favorable if another attorney had accompanied them to court.

QUESTION PRESENTED

In a case governed exclusively by the common law of the State of New York and not involving any federal questions or conflicts among federal courts of appeals, should the court exercise its discretion to grant a writ of certiorari?

SUMMARY OF THE ARGUMENT

This case does not present any facts or legal issues warranting a writ of certiorari. The basis for federal subject matter jurisdiction before the District Court was diversity of citizenship. Even with the most liberal construction, it is clear that the complaint does not present, or even allude to, any federal question, much less one in conflict and need of resolution by this court. In fact, the decision of the District Court and the Court of Appeals was based solely upon the application of the common law of the State of New York.

ARGUMENT

POINT I

THE DECISION OF THE COURTS BELOW WAS BASED ENTIRELY UPON THE COMMON LAW OF THE STATE OF NEW YORK

The District Court found that the plaintiffs were estopped to deny the voluntary nature of their settlement. The court relied upon the holding of the New York State Appellate Division, Fourth Department, in Owens v. Lombardi, 41 AD2d 438. The courts below recognized the fact that the settlement would not have been accepted and the instant litigation would have been avoided if the plaintiffs responded differently to the questions of the trial judge.

The courts below also concluded that the plaintiffs' case against Channel 6 would have been dismissed, as a matter of law, under the binding authority of the New York State Court of Appeals

holding in Gaeta v. New York News, 62 NY2d 340 (1984). In Gaeta, the court explained and further refined the standard of proof to be applied in defamation actions when private individuals seek recovery as a result of being defamed with respect to their involvement in matters of legitimate public interest. This court, in Gertz v. Robert Welch, Inc., 418 US 323 (1974), held that such standards should be developed by the states.

After the decision in Gertz, the New York State Court of Appeals, in Chapadeau v. Utica Observer, 38 NY2d 196 (1975), held that the required standard of proof was to demonstrate that the reporter acted with "gross irresponsibility." Within the context of a motion for summary judgment, the Gaeta case interpreted the gross irresponsibility standard in a manner that made it clear

that Channel 6 would be entitled to judgment as a matter of law.

It should also be noted that the strict application of the gross irresponsibility standard in Gaeta represented a reversal of an earlier determination by the Appellate Division, First Department. See 95 AD2d 315 (1st Dept., 1983). The DeGraff firm proceeded with the representation of the plaintiffs based upon the authority of the Appellate Division decision in the Gaeta case until the summer of 1984, when the DeGraff firm first became aware of the Court of Appeals decision reversing the Appellate Division's opinion in Gaeta. The Court of Appeals handed down this decision on June 12, 1984. Thus, there was a change in controlling law during the pendency of the plaintiffs' action against Channel 6.

The courts below also found that, as a matter of state law, the plaintiffs had

not suffered any proximate and legally cognizable damage as a result of the settlement and did not present any facts to demonstrate that they would have obtained greater relief in the absence of a settlement. Applying state law, the District Court found that the plaintiffs had not met their burden of showing "actual damage," citing Becker v. Julian, 95 Misc. 2d 64 (Sup. Ct., N.Y. Cty., 1977), modified on other grounds 66 AD2d 674 (1st Dept., 1978), app. dsmd. 47 NY2d 761 (1979). Also, Ressis v. Wojick, 105 AD2d 565 (3rd Dept., 1984), motion for leave to appeal denied 64 NY2d 609 (1985).

In summary, the decisions of the District Court and the Court of Appeals clearly demonstrate that no federal questions are involved. In a case which

is solely governed by state common law, there is no basis to warrant a writ of certiorari.

POINT II

NONE OF THE CONSIDERATIONS WARRANTING A WRIT OF CERTIORARI, AS SET FORTH IN RULE 17, ARE PRESENT IN THIS CASE

None of the criteria set forth under Rule 17 are present in this case.

1. The decision of the Court of Appeals in this case does not conflict with the decision of any other federal Court of Appeals on the same matter.

2. The Court of Appeals has not decided any federal question, let alone a federal question in a way that conflicts with a state court of last resort.

3. There is no basis to conclude that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, so as to call for an exercise of this Court's power of supervision. Indeed,

the record is plain that these plaintiffs, as pro se litigants, have received the benefit of the doubt every step of the way. Nevertheless, the District Court judge and the three judges of the Court of Appeals for the Second Circuit have all agreed, based upon principles of state law, that the plaintiffs' complaint must be dismissed.

Finally, the plaintiffs assert that the trial judge denied them an adjournment to find new attorneys. Even assuming, ad arguendo, that the plaintiffs' characterization of the proceedings before the trial court is correct with respect to their request for an adjournment, the trial judge's alleged refusal to postpone the trial to enable plaintiffs to hire new lawyers has no bearing on this application. It hardly needs to be said that the decision of whether or not to adjourn the trial was

solely within the province of the trial judge, and a matter over which the DeGraff firm had absolutely no control. In this regard, it should further be noted that the DeGraff firm was never discharged by the plaintiffs; nor was the DeGraff firm asked by the plaintiffs to withdraw, a step which, in any event, would have required permission from the court.

Moreover, the courts below implicitly determined that the plaintiffs were not damaged, in any way, by the trial judge's refusal to grant an adjournment. The courts below concluded, based upon the principles of New York common law, that regardless of when, where, or by whom the plaintiffs' case was tried, it would ultimately have been dismissed under the holding of the Gaeta case and because of the plaintiffs' failure to show legally cognizable damages. Thus,

any refusal to grant an adjournment, even if assumed to be true, could not have produced a more favorable result for the plaintiffs.

CONCLUSION

For all of the above reasons, the plaintiffs' application for a writ of certiorari should be denied.

Dated: October 7, 1988

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Of Counsel:
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APPENDIX

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ANNA BROAD and PAUL BROAD,

Plaintiffs,

-against- 82-CV-1236

GENERAL ELECTRIC BROADCASTING COMPANY, INC., and JUDY SANDERS,

Defendants.

TRANSCRIPT OF PROCEEDINGS in the above-entitled matter, settlement stipulation, came on in United States District Court, Northern District of New York, U.S. Post Office and Courthouse, Albany, New York, on Tuesday, September 17, 1985 before the Hon. Lee P. Gagliardi, U.S. District Judge, presiding.

APPEARANCES:

DeGRAFF, FOY, CONWAY,
HOLT-HARRIS & MEALEY
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Albany, New York,
Attorneys for Plaintiffs,
BY: ROBERT H. ISEMAN, ESQ.

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101 Columbia Street,
Albany, New York,
Attorneys for Defendants,
BY: ALVIN O. SABO, ESQ.

(Whereupon, the following proceedings took place in open Court; no jury present; all counsel present.)

THE COURT: Ready to proceed?

MR. ISEMAN: Ready for the Plaintiff, your Honor.

MR. SABO: Ready for the Defendant, your Honor.

THE COURT: All right. That's the choice of everybody?

MR. SABO: Well, can I have just 30 second, your Honor?

THE COURT: All right.

MR. SABO: I think we've got it, Judge.

THE COURT: Let's put it on the record then. Somebody's going to have to start.

MR. ISEMAN: I am not at all clear on what the terms of this are, your Honor. I think we're ready to proceed at this point.

THE COURT: You have a proposed disposition of this matter; is that correct?

MR. SABO: I do, your Honor.

THE COURT: All right. Mr. and Mrs. Broad, will you listen to the proposition that Mr. Sabo, on behalf of the Defendants, is making which I wish you to listen to attentively, and after it is on the record, I'm going to ask you if you agree to it, and I'm going to ask you if this is your own voluntary desire to dispose of this matter in this manner. Do you understand that?

MR. BROAD: Yes, your Honor.

THE COURT: And I want to be sure that you have no coercion, no external influence and that

this is your free and voluntary desire. Do you understand that?

MR. BROAD: Yes, your Honor.

THE COURT: All right. Mr. Sabo, would you proceed.

MR. SABO: Thank you, your Honor. What I propose is this: That in exchange for a release of Station WRGB and Judge Sanders and a stipulation of discontinuing the action, we do the following: We pay the sum of $25,000; that we further agree to do a follow-up news story indicating that the death of your daughter, the homicide of your daughter, is still unsolved, still is an unsolved homicide on the books, and that Items 15A

through D -- in view of information that has come to light to WRGB, statements A, B, C and D in Paragraph 15 are not true.

MR. BROAD: Which are these?

MR. SABO: These are the ones indicating to --

MR. BROAD: I stipulate that all the claims which were made in our Plaintiffs' claim to the Court be corrected in a way that the station states that these allegations which the station did are -- on their broadcast on 16th of November '81 are not true.

THE COURT: I understand that's what --

MR. SABO: Yes. The way it would be done, Mr. Broad, so there would be no confusion -- I don't want you to come back

later and say we didn't keep our word. What they'll say is that with all the information that's come to light over the past few years, perhaps in the course of this, they discovered that Items A through D were untrue.

MR. BROAD: These are all what we claim, right?

MR. ISEMAN: Yes.

MR. SABO: In addition, they'll be willing to say that they're very sorry for any inconvenience and harm that you and Mrs. Broad were subjected to.

MR. BROAD: That's correct.

THE COURT: Is that satisfactory now?

MR. BROAD: Yes, your Honor.

THE COURT: Mrs. Broad, is that satisfactory to you?

MR. BROAD: However --

THE COURT: Yes.

MR. BROAD: -- I would like to stipulate, your Honor, that it will be done on the six o'clock news and repeated maybe the next day on the same time.

MR. SABO: Well, no, that can't be done.

MR. BROAD: Or the 11 o'clock news.

MR. SABO: Yes, that can be done, 6:00 and 11:00.

MR. ISEMAN: The understanding as to who is going to do it, I assume that would be Miss Sanders.

MR. SABO: No, I don't think so. I --

THE COURT: Regular broadcaster for that news program; is that satisfactory?

MR. BROAD: Who will do that?

THE COURT: The regular broadcaster for that news program.

MR. ISEMAN: We understand it would not be Judy Sanders?

MR. SABO: It would not be Judy Sanders or the manager of the station.

THE COURT: Whoever they have that broadcasts that regular news; is that satisfactory?

MR. BROAD: That will be satisfactory.

THE COURT: On the six o'clock and the 11 o'clock news within what period of time, within the next week? Within the next week?

MR. ISEMAN: I think we'd like an understanding of when it's going to be done.

MR. BROAD: It should be done today or tomorrow.

MR. SABO: Mr. Broad, the station would also like to do an interview with you in connection with what they're going to say.

MR. BROAD: Yes, I would agree to that, under the conditions that it will not be edited or it will not be aired without my permission.

MR. SABO: I think we could agree to the latter, that it wouldn't be aired without your permission, but they have to be able to edit it.

MR. BROAD: All right. Let them edit it. However, not aired without my permission.

THE COURT: It should be edited and, as edited, will not be aired without the permission of Mr. Broad; is that satisfactory? Well, I assume what's going to happen -- I don't know their business and I shouldn't speak for them, but I assume when you

have an interview with Mr. and Mrs. Broad, that after that interview, there may be certain things that you may feel, because of time limitations or otherwise, you want to eliminate, and after you show Mr. Broad what it is that you are going to present on the air, he will have the right either to permit its being aired or not; that's all. Do I understand your --

MR. BROAD: Yes, but not changed.

THE COURT: But not changed, that's correct, and then he'll have the option of either saying go ahead and play it or don't play it; is that satisfactory?

MR. BROAD: However, we may agree on a correction.

THE COURT: If you agree, then there's no problem.

MR. BROAD: We both have to agree on a correction.

THE COURT: If you agree on that, that should present no problem. All right. Anything else?

MR. ISEMAN: May I just have one word with my clients, your Honor.

THE COURT: All right.

MR. ISEMAN: All right, your Honor.

THE COURT: Mr. Decker, is that satisfactory to the Defendant, the settlement that's been dictated on the record?

MR. DECKER: Yes.

THE COURT: Mrs. Sanders, is that satisfactory to you?

MS. SANDERS: Yes, I think so, Judge.

THE COURT: Mr. Sabo?

MR. SABO: Yes, your Honor.

THE COURT: Mr. and Mrs. Broad?

MR. BROAD: Yes, your Honor.

MRS. BROAD: Yes.

THE COURT: All right, and Mr. --

MR. BROAD: One little stipulation; that the interview which will be done with us wouldn't be done by Miss Sanders or by Larry Swartz.

THE COURT: That's correct. You've got their assent to that. Mr. Iseman, is that satisfactory to you?

MR. ISEMAN: Yes, your Honor.

THE COURT: I understand the settlement check will be forthcoming within the next two weeks.

MR. SABO: Sure, if I get the papers.

THE COURT: Upon receipt of a general release and the case is discontinued. Now, everybody satisfied with the disposition or at least you

agree to it? Whether you're satisfied with it is something else again.

MR. SABO: No objection.

THE COURT: Is that satisfactory, Mr. Broad?

MR. BROAD: Yes, sir.

THE COURT: Mrs. Broad?

MRS. BROAD: Yes.

THE COURT: And no coercion or influence has been exerted upon you by anyone to enable you to arrive at this disposition; is that correct?

MR. BROAD: Correct, your Honor.

THE COURT: Mrs. Broad?

MRS. BROAD: Yes.

THE COURT: All right. Jury in, please. (Whereupon, the following proceedings took place before the Court and jury.)

MR. ISEMAN: Your Honor, may we approach the bench?

(Discussion off the record at the bench.)

THE COURT: All right.

(Jury excused.)

(Whereupon, the following took place out of the presence of the Court.)

MR. SABO: In further amplification of the settlement entered into by the parties which has been placed on the record before Judge Gagliardi, we want to stipulate to the following: That the interview with Mr. Broad would not take place tonight, at which time the updated news story, with whatever we had previously agreed to on the record, will be stated in that news story.

The interview of Mr. Broad will take place in a couple of weeks or a few weeks and will concentrate, as part of

the news story, on talking about the unsolved murder, the unsolved homicide, of Mr. and Mrs. Broad's daughter, and, again, Mr. Broad, as I understand it, this trial is not going to be part of the interview, but what's going to be concentrated on is the unsolved homicide of your daughter; is that correct?

MR. BROAD: Correct.

MR. SABO: Is that agreeable, Counsel?

MR. ISEMAN: So stipulated.

MR. DECKER: And Mr. Broad will have the opportunity to say that the -- whether the edited interview goes on or doesn't go in its entirety.

MR. SABO: Right. I think that's already on the record.

MR. DECKER: It's amplified here, as part of that story.

MR. BROAD: I have here one question. Do I have to agree to the entirety or can I say that --

MR. SABO: You can suggest but you don't have final say. He has final say about whether it goes or not and you have final say about whether it goes or not.

MR. BROAD: But if we have a problem with one segment --

MR. DECKER: If we come to an agreement, fine. If we don't come to an agreement, it doesn't go.

MR. BROAD: The segment, not the entirety.

MR. DECKER: No, no, no. We will interview you. We will edit the interview.

MR. BROAD: Right.

MR. DECKER: And let's make believe the interview is edited to a

minute and a half. We show the minute-and-a-half interview. You say that represents your viewpoint, fine. No, that doesn't represent your viewpoint, if we can agree to change it to represent the viewpoint, fine. But if we can't agree, then it doesn't go because you won't want it on the air.

MR. BROAD: Right.

MR. DECKER: Then your interview will not be part of that updated story which we will still have done regarding the unsolved crime.

MR. BROAD: If we have this story and we have one point where you edit it out which I don't agree with it but I agree with the other parts of the

story, what do we do then?

MR. DECKER: If we can change it to your satisfaction, we will, but if we can't change it to your satisfaction, if I can't change it to your satisfaction --

MR. BROAD: Only that segment.

MR. DECKER: -- then the whole interview is dead because you don't approve the interview. You have the right to approve it or not approve it. We edit it; you approve it.

MRS. BROAD: I don't want to agree to that.

MR. BROAD: What I am saying is that if I don't agree with a segment or one subject that we discuss, that that doesn't mean that we have to throw out the whole interview.

MR. DECKER: Then you can agree to let it go.

MR. SABO: I think what we already agreed to in front of the judge, that was your choice; you can say no, I don't like what they did and I don't want it to be broadcast.

MR. BROAD: The whole thing, then I have -- you mean in the entirety?

ME. DECKER: The edited version would not go on the air unless you were satisfied with it.

MR. BROAD: Good. All right.

MR. SABO: Okay?

MR. DECKER: And if you're not satisfied with it and I can't satisfy you, then it will not run.

MR. ISEMAN: At all.

MR. BROAD: Okay.

(Whereupon, the proceedings in the above-entitled matter were concluded.)

C E R T I F I C A T I O N

I, LAURA A. ASHBROOK, Official Court Reporter for the United States District Court, in and for the Northern District of New York, do certify this to be a true and accurate transcript of the stenographic record of the foregoing taken at the time and place noted in the heading hereof.

S/ Laura A. Ashbrook
LAURA A. ASHBROOK
Official Court Reporter
United States District Court
Northern District of New York